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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT MORENO,

Defendant and Appellant.

F042184

(Super. Ct. No. SC084378)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Daniel Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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This is a companion case to *People v. Albert Moreno*, F042185, in which we have today affirmed appellant's conviction for first degree murder (Pen. Code, § 187, subd.

*Before Cornell, Acting P.J., Gomes, J. and Dawson, J.

(a)),¹ and of being a felon in possession of a firearm (§ 12021, subd. (a)(1)).² In the present case, after a separate trial, appellant was convicted of resisting an executive officer, in violation of section 69. In both of appellant's cases, he was charged with having suffered four prior "strike" convictions (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and four prior prison terms within the meaning of section 667.5, subdivision (b). In the murder case, in addition, he was charged with having suffered four prior convictions for serious felonies, within the meaning of section 667, subdivision (a). He appeals in the present case, alleging only sentencing error. We will order that the sentence be modified and otherwise affirm.

FACTS

The facts underlying appellant's conviction for violating section 69 are not relevant to the appeal, and we need not recite them. Instead, we set out those procedural facts necessary to address the sentencing error alleged.

In both of appellant's separate trials, the charged enhancements were found true. On December 30, 2002, a combined sentencing proceeding occurred. The court sentenced appellant to an aggregate term as follows. In the murder case (No. F042185), the trial court imposed the principal term which totals 100 years to life plus a determinate term of 12 years—25 years to life for the murder conviction, tripled because of appellant's strike convictions; plus a consecutive 25 years to life term for use of a firearm within the meaning of section 12022.53, subdivision (d); plus two consecutive five-year terms pursuant to section 667, subdivision (a) for having suffered two prior serious felony convictions (two of the strike convictions); plus two consecutive one-year terms for two of the four prior prison term enhancements alleged pursuant to section 667.5, subdivision (b). The other two prior prison term enhancements were stricken because the

¹All further statutory references are to the Penal Code unless otherwise indicated.

²Pursuant to appellant's request, we take judicial notice in the present case of the contents of this court's file in case No. F042185.

underlying convictions had already been used for the two 5-year serious felony terms imposed. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1151-1153.) Sentence on the second offense in the murder case, for violating section 12021, subdivision (a), a 25 years to life sentence, was ordered stayed pursuant to section 654.³

In the present case, the trial court imposed a subordinate term of 25 years to life for the single-count conviction, based on the fact of appellant's prior strikes, plus four consecutive one-year terms based on four section 667.5, subdivision (b) prior prison terms. The aggregate term for both cases thus was 125 years to life, plus 16 years.

Appellant contends his sentence in the present case, and thus the aggregate term, must be reduced by four years. Respondent concedes this point, and we agree.

It is settled that sentencing enhancements for prior prison terms do not attach to particular counts. (*People v. Smith* (1992) 10 Cal.App.4th 178, 182.) In *Smith*, for example, the trial court erred in sentencing the defendant to a one-year enhancement for a prior prison term on each of two counts of conviction; the prior prison terms were "one and the same," and enhancements relating to the nature of the offender, not to the nature of the offense, "'have nothing to do with particular counts [and] ... are added only once as a step in arriving at the aggregate sentence.'" (*Ibid.*, quoting *People v. Tassell* (1984) 36 Cal.3d 77, 90, disapproved on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 387.)

The distinction between the present case and *Smith* lies in the fact that here the principal and subordinate terms arise from convictions in separate trials whereas, in *Smith*, both counts of conviction stemmed from a single case. The parties here are agreed, however, that this is a distinction without a difference because section 1170.1, which provides for aggregate terms of imprisonment, applies "when any person is

³Two of appellant's strikes and two of the section 667, subdivision (a) serious felony priors found true in the murder case stem from juvenile adjudications. Though the court did not explicitly strike the two section 667, subdivision (a) allegations, it did follow the recommendation contained in a sentencing report and refrained from sentencing on those enhancements.

convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts” (§ 1170.1, subd. (a).)

We conclude, therefore, that the aggregate sentence imposed in this matter must be reduced by four years.

Appellant contends, and respondent agrees, that the appropriate remedy in this case is to order stricken the four sentencing enhancements in question. While we note that there is authority for the use of a stay rather than striking the duplicative enhancements (see *People v. Jones* (1992) 8 Cal.App.4th 756, 758; *People v. Lopez* (1983) 147 Cal.App.3d 162, 165), and that the use of a stay would, if permitted by law, be appropriate in a situation involving an aggregate sentence from separate cases, we will leave that issue to a future case in which it is pursued by a party.

DISPOSITION

The trial court is directed to strike the four section 667.5, subdivision (b), one-year sentences it imposed in the present case, and to amend the abstract in this case and case No. F042185 (Kern Super. Ct. No. SC084379) in accord with the holding above.